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ALEXANDER L. STEVAS

No. 83-850

In The
Supreme Court of the United States
October Term, 1983

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UNITED STATES OF AMERICA,
Petitioner,
vs.
JAMES CONNORS KARO, *et al.*,
Respondents.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

BRIEF FOR RESPONDENTS KARO, ROTH AND STEELE

—o—

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STATEMENT OF FACTS

The government's statement of facts is adequate except for the following additions:

In a footnote to its Statement of Facts, the government errs in describing Karo's status (Brief 10 n.5[1]). Although it correctly notes that Karo had no connection

[1]The brief for the United States in this Court is cited herein as "Brief"; the appendix to the Petition for Certiorari is cited as "Pet. App."; and the Joint Appendix, "J. App."

with the Taos residence the government searched as the culmination of the beeper activity (except that the search of that residence was the fruit of the intrusion of the beeper into Karo's personal property and the monitoring of it in his home), the government incorrectly claims Karo's fourth amendment interest depends solely on the installation of the beeper in his ether. The government also invaded Karo's fourth amendment interests by monitoring the beeper in his home. The Court of Appeals noted this, *United States v. Karo,* 710 F.2d 1433, 1437, 1440 (10th Cir. 1983), and it is supported by the record (J. App. 54).

The government's statement of facts notes that while under visual surveillance Karo took the ether to his house and then returned to the informant, Muehlenweg's residence. The government fails to mention, however, that when Karo returned to Muehlenweg's house, it was without the ether, a fact the agents learned when, through the use of their beeper, they determined that the ether container remained in Karo's house (J. App. 54).

SUMMARY OF ARGUMENT

The Court of Appeals correctly ruled that both the installation of a beeper in a private property and the monitoring of a beeper inside a home are searches within the meaning of the fourth amendment and require probable cause and search warrants. The government asserts the rather remarkable proposition that "neither the language nor the history of the Fourth Amendment reflects any intention to require warrants as a condition to a law-

ful search or seizure" (Brief 14). Although some searches do not require warrants,

> "[s]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."

United States v. Ross, 456 U.S. 798, 825 (1982) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

The point of departure in the government's argument is that the use of beepers does not constitute a search because the beeper only says "Here I am." (Brief 36). The premise to which the government continuously returns misconstrues the true role of the beeper as a surveillance tool. In our case the DEA agents secreted the beeper in a container of ether. Just as a police agent might enter a home to search for and possibly seize evidence, so these DEA agents turned on their receivers and searched until they found the beeper-laden container inside homes and storage lockers. Barring limited exigent circumstances, a police officer could never cross the threshold of a home without a warrant. The use of a beeper to search a home for a particular piece of evidence (here the ether container) is exactly the same kind of search.

Installation of the beeper inside the sealed ether container violated legitimate expectations of privacy of the three respondents who owned the container. The ether did not in any meaningful sense belong to the informant. Three of the respondents had the real interest in it. Any technical application of property law that would give the informant the ability to invade the respondents' expectations of privacy in their property would be inconsistent

with the fourth amendment's protection of "people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). It would be like giving the government, acting through its informant, the right to plant a listening device on the respondents, to remain in place after the informant had departed.

The government argues here that the installation and monitoring of beepers should, even inside private homes and inside private personal property, join the exceptions commonly known as exigent circumstances that do not require warrants. These proposed new "beeper" exceptions are nothing more than attempts to avoid the warrant requirement so clearly a part of the fourth amendment. The government would evade the warrant provision by:

1. Asserting that use of a beeper is never a search (Brief 17, 23);

2. Destroying the distinction between searches within a home and searches in other non-private locations (Brief 26-27);

3. Claiming that, if probable cause is required, a warrant is not (Brief 38);

4. Lowering the standard from probable cause to reasonable suspicion (Brief 31);

5. Asserting the absurd proposition that it is impossible or unfeasible to obtain a warrant for a beeper (Brief 42-46); and

6. Ignoring the import of changes in modern technology (Brief *passim*).

Finally, the fact that government agents lied to a judge to obtain the warrant in this case is an independent

ground for suppression based on due process and the courts' supervisory power. Federal courts "must draw the line at misconduct occurring within our own house[s]." *United States v. Cortina*, 630 F.2d 1207, 1217 (7th Cir. 1980).

ARGUMENT

I. Monitoring A Beeper Within A Place In Which One Has A Reasonable Expectation Of Privacy Is A Search Within The Meaning Of The Fourth Amendment.

The beeper is a surveillance tool used to search for the object into which it is placed. When this search occurs within a place where one has a reasonable expectation of privacy, it constitutes a fourth amendment search. The government describes the intrusion of a beeper as *de minimis* because the beeper only announces its presence (Brief 36) (and, more importantly, the presence of the container in which it is secreted), but does not give any information regarding the whereabouts of the defendants. The government's arguments concerning what a beeper is, what it does, and what it can do are disingenuous, inconsistent, and not supported by the record. It calls a beeper "merely a radio transmitter" (Brief 25). Unequivocally a beeper, like many electronic surveillance devices, is a radio transmitter; however, "merely" is hardly a correct adjective for a device that transmits information from within the privacy of homes and other areas protected by the fourth amendment.

According to the government, the beeper does not disclose its "exact location" (Brief 25) when "monitored

from a distance." (*Id.*). Neither the government's brief nor the record, however, tells us what "distance" is necessary to destroy the capability of exactly locating it. In this age of electronics it is a simple matter to get extremely accurate fixes using electronic devices. Many of these devices are "merely" radio transmitters and receivers.

Furthermore, neither the record nor the brief explains the "usual case" in which police agents "cannot determine its precise resting place without exposing themselves to detection." (*Id.*). We may assume that under cover of night or disguise the agents can usually get close enough to the resting place to precisely determine its location. The government does not contend that this case is not "usual"; it does state that here, at least, the beeper did disclose that "the ether was inside private premises" at the most crucial time. (*Id.* n.9).

This reference to the *ether* being inside private premises diverges from the government brief's consistent position that the beeper only discloses its own location. Obviously, the beeper does disclose the location of its container and of that container's contents. And it is normally the location of such items that police officers are trying to determine when they search private premises. Moreover, in the case of a physical search, it is usually much more important to determine that the item was within the premises than it is to ascertain exactly where it was located within the premises. For example, a police officer commonly seeks a search warrant so he can enter a home and search for a particular piece of evidence. Similarly, a policeman turns on his receiver and uses his beeper to "search" for a particular piece of evidence, perhaps finding it in a home, as happened here. The information

that the beeper discloses is, therefore, the same as the information disclosed by other searches subject to the warrant and probable cause requirements of the fourth amendment.

The government acknowledges, moreover, that some beepers even disclose what is happening to their containers while in these premises. (*Id.* n.10). The government stops short of asking this Court to bottom its decision on the kind of beeper employed, undoubtedly aware of the trend in recent fourth amendment cases to establish clear and unvarying rules that do not require policemen to indulge in complex analyses depending upon factual nuances. See, *e.g., United States v. Ross,* 456 U.S. 798, 821, 822 (1982). Such distinctions among these kinds of electronic transmitting devices would plunge the courts and law enforcement officers into a hopeless technological quagmire.

The government attempts to justify use of the beeper and at the same time deny that it is used to search on the grounds that it really does not help all that much. It claims everything the beeper discloses, the agents could discover by constant surveillance. (Brief 37). At the same time, the government maintains that it is a sorely needed law enforcement tool. (Brief 28 n.12). The government concedes, as it must given the facts in this case, that the beeper gives it capabilities it absolutely could not have even with a veritable army of visual surveillance agents.[2] In addition to the location and activity within the opaque walls of a house, the possibility is more actual than "theoretical" (Brief 28 n.12) that measures that

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[2]The Court of Appeals found that, "[t]he beeper gave law enforcement officials information that could not be discovered by ordinary visual surveillance, even had that surveillance been constant." 710 F.2d at 1439.

would not be detected by lawful visual surveillance, would have no effect on electronic surveillance. In this case the agents followed Karo visually only to discover later that he had left the beeper and ether in his house. (J. App. 54).

Illinois v. Andreas, 103 S. Ct. 3319 (1983), does not support the government's argument. The Court decided that case on the rationale of the plain view doctrine:

> [O]nce a container has been found to a certainty to contain illicit drugs, the contraband becomes like objects physically within the plain view of the police, and the claim to privacy is lost.

Id. at 3324 (footnote omitted).

The Court reasoned that it was nearly impossible in the short period that the container was out of sight of the police for its contraband contents to have been changed; consequently its reopening was not a search. *Id.* Here, the container was behind closed doors for extended periods of time.

A search is not any less a search because the resources used cannot relay total information. A search that discloses facts about a piece of closed personal property is a search. "[T]he Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." *United States v. Ross,* 456 U.S. 798, 822-23 (1982). It is outreageous to describe a surveillance tool, used for five months, invading four residences and two storage lockers as a *de minimis* intrusion.

> An intrusion is not de minimis if it violates an individual's legitimate expectation of privacy. The Government's argument that the beeper surveillance is too minor an intrusion to constitute a search begs the question: the intrusion is minor only if it does not violate protected individual privacy.

United States v. Bailey, 628 F.2d 938, 940 (6th Cir. 1980) (footnote omitted). Another Court of Appeals has noted that the "unintrusiveness of a search does not reduce, or have any effect on, the basic expectation of privacy in the thing searched." *United States v. Beale*, 52 U.S.L.W. 2280 (9th Cir. Oct. 24, 1983).

II. Any Search Within A House Or Private Storage Locker Invades Legitimate Expectations Of Privacy.

Nothing has been so firmly rooted in the constitutional history of this country and indeed of the English common law has the right to privacy inside one's home. William Pitt, (the Elder) Earl of Chatham, said it most eloquently when he addressed the House of Commons in March 1763:

> "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!"

Quoted in *United States v. Ross*, 456 U.S. 798, 822 n.31 (1982). See also *Miller v. United States*, 357 U.S. 301, 307 (1958). This Court has never failed to affirm this fundamental constitutional right. "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York*, 445 U.S. 573, 590 (1980).

In defiance of this clear historical mandate, the government seeks to erase the major premise of the fourth amendment, leaving nothing but an empty shell.

> [G]iven the limited information conveyed by a beeper and the limited uses to which such information may

> be put, it is wholly arbitrary to differentiate for constitutional purposes between beeper signals that emanate from inside rather than from outside private premises.

(Brief 26-27).[3]

This crucial constitutional distinction remained firmly intact in the only beeper case this Court has decided, *United States v. Knotts*, 103 S. Ct. 1081 (1982).

> Respondent Knotts, as the owner of the cabin and surrounding premises to which Petschen drove, undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin was concerned.

Id. at 1085.

Each respondent in this case had the same "traditional expectation of privacy within a dwelling place" that *Knotts* affirmed. Without benefit of a warrant, DEA agents monitored their beeper inside houses and storage lockers owned by or occupied by each respondent in this case. No accepted exigent circumstance existed to avoid the warrant requirement.[4]

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[3]In another section of its brief, the government refutes this argument that it is "wholly arbitrary" to differentiate between the inside of a house and the outside (Brief 27) by conceding that a warrant is required to go into a house to replace the batteries in a beeper (Brief 44, n.19). But this warrant requirement would be just as arbitrary if the agent truly confined himself to replacing the batteries. Indeed, it is more illogical because the hypothetical agent who confines himself to the batteries, searches for and seizes nothing while in the house, whereas the beeper tells the government that its container is in the house, *i.e.*, it searches the house for the container and finds it.

[4]The government has not argued below that any exigent circumstances existed to avoid the warrant requirement. Given the fact that the government did get a warrant here, albeit a defective one, the argument is specious.

The government argues that the information gained from monitoring the beeper is the same whether the beeper is inside or outside a home, making the resultant searches indistinguishable. (Brief 26). This is clearly not the case. For instance, the police may seize a marijuana plant sitting by the curb without a warrant but cannot seize that same plant located inside a house unless by proper warrant. Similarly, an officer can lift a fingerprint from an outside fencepost but must have a warrant to enter a suspect's home to search for or seize a fingerprint from an inside window. The flaw in the government's analysis is that the protection of the fourth amendment does not turn on the type of information gathered. The focus, rather, is on the subject's interest in the place searched or the property seized. *E.g., United States v. Salvucci,* 448 U.S. 83 (1980). The beeper is in reality a tiny, yet ubiquitous, government agent hiding inside the house, continuously searching to determine that its container remains in the home and broadcasting this information to agents on the outside.

III. Both Probable Cause And A Warrant Are Required To Monitor A Beeper Inside A House.

Without explicitly saying it, the government advances here for the first time in this litigation the proposition that this Court should overrule the long-standing principles of cases such as *Johnson v. United States,* 333 U.S. 10 (1948)[5], and *Vale v. Louisiana,* 399 U.S. 30 (1970). The government contends that even if probable cause is re-

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[5]The government cites *Johnson* in support of its argument against the need for a warrant (Brief 41). The defendants strongly agree with the implications of the government's quotation from that case, that the conclusion as to whether prob-

(Continued on next page)

quired, a warrant should not be. (See Brief 38-46). This contention flies directly in the face of well-established, fundamental requirements of the fourth amendment to require both a showing of probable cause and a warrant.

> Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

Johnson, 333 U.S. at 14 (footnote omitted). And:

> our past decisions make clear that only in "a few specifically established and well-delineated" situations . . . may a warrantless search of a dwelling withstand constitutional scrutiny, even though the authorities have probable cause to conduct it.

Vale, 399 U.S. at 34.

In *Michigan v. Clifford*, 104 S. Ct. 641 (1984), this Court reaffirmed the viability of the warrant requirement where houses are involved. Although there was some disagreement over the exigency of the circumstances and over the standards for an administrative search, the Court was unanimous that absent consent or exigency a warrant is required when government agents enter a house to gather evidence of criminal activity. *Id.* at 646 (plurality opinion), 652 (Stevens, J., concurring), 653 (Rehnquist, J.,

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able cause exists should " 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime' " (*id.*, quoting 333 U.S. at 14). This case is a perfect illustration of this need. Here, the law enforcement officials, including an Assistant United States Attorney, were so swept up in their "competitive enterprise" that they lied to the "neutral and detached magistrate." (J. App. 156).

dissenting, but agreeing with the majority that either a warrant issued upon probable cause or exigent circumstances is required). With some exceptions not relevant either there or here, "the nonconsensual entry and search of property is governed by the warrant requirement of the Fourth and Fourteenth Amendments." *Id.* at 646.

The government concludes its argument with a quotation from Professor LaFave's treatise which seemingly supports a contention that the warrant clause might not apply. (Brief 46). It omits, however, two pertinent facts about this quotation: (1) The sentence immediately before the quotation shows the professor is discussing "the use of trained dogs to sniff out drugs or explosives." 1 W. LaFave, *Search and Seizure,* § 2.2, at 289 (1978). (2) The sentence immediately following the government's quotation is: "However, this position has not as yet received attention from the courts." *Id.* at 290. In his supplement the author discusses this Court's approval of some uses of "canine sniffs" in *United States v. Place,* 103 S. Ct. 2637 (1983). *Id.* at 80-85 (Supp. 1984). He notes that the use of the dog approved in *Place* "disclosed only criminality and nothing else," *id.* at 80, and "no intrusion upon an innocent person's privacy interest occurs," *id.* at 81. Here the beeper disclosed the location of noncriminal materials within the home and invaded at least one innocent person's privacy interests. The beeper discloses a great deal more than criminality and is thus more like a traditional physical search than the *"sui generis"* dog sniff. 103 S. Ct. at 2644.

Even if it were appropriate to consider the issue for the first time in this Court,[6] there is no valid reason to make beepers an exception to the warrant clause. Counsel have found no cases requiring probable cause yet dispensing with the warrant requirement for searches except in situations involving exigent circumstances or consent.[7] The government, in fact, never advances a clear rationale for creating a beeper exception to the warrant requirement. It complains that the Court of Appeals' "holding will force agents to obtain warrants in every beeper case . . . ." (Brief 39). The obvious rejoinder is to ask what is so terrible about obtaining a search warrant, at least when, as is usually the case with beepers and was the case here, there

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[6]The facts upon which the government relies for probable cause are not facts that it included in its affidavits for warrants in this case. The trial judge specifically found that "[o]nce the incorrect and misleading portions of the affidavit are purged . . . the remaining content is not sufficient to establish probable cause" (Pet. App. 22a). The trial judge never made a factual finding regarding the facts the government now states constitute probable cause because he ruled that "the law is clear as far as the probable cause, you can't go outside of the affidavit . . ." (J. App. 156). Even the limited fact finding done by this Court in constitutional cases would not be appropriate here because the credibility of the witnesses upon whom the government is relying for the facts has already been questioned by the trial court (J. App. 156). Furthermore, while the government asserts that "[t]he court of appeals did not question the existence of probable cause in this case" (Brief 39), the government did not claim before that court that it had probable cause.

[7]*Vale* refers to the consent exception and breaks the exigent circumstances into several categories: response to an emergency, hot pursuit, goods in the process of destruction or about to be removed from the jurisdiction. 399 U.S. at 35. *Carroll v. United States*, 267 U.S. 132, 151, 153 (1925), makes clear that the automobile exception to the warrant requirement is based on exigent circumstances—the moveability of the vehicle makes it impractical to get a warrant.

is ample time to do so. And of course exigent circumstances can sometimes excuse failure to comply with the warrant requirement. More fundamentally, the government's complaint betrays its hostility to search warrants and to the Constitution. The government expounds on its hostility to the Constitution by complaining that a "warrant requirement would necessitate compliance with various procedural technicalities . . . ." (Brief 45). This is said to raise the specter that the evidence could be suppressed and to "trivialize the Warrant Clause." (*Id.* 46). The government never explains how this is different from other situations where a warrant is required. The "various procedural technicalities" are nothing more than the requirements of the fourth amendment's Warrant Clause; to call them technicalities does not enlighten the argument although this terminology in itself may be said to "trivialize" the fourth amendment. The government's position here goes beyond the argument the government made, and the Court rejected, in *Katz:*

> The Government does not question these basic principles [of the fourth amendment]. Rather, it urges the creation of a new exception to cover this case. It argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree. Omission of such authorization "bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck v. Ohio*, 379 U.S. 89, 96 (1964).

389 U.S. 347, 358 (1967) (footnote omitted).

In presenting the specter of suppression, the government argues the case that is *not* before the Court. It refers to the possibility "of an inadvertent failure to observe some procedural technicality associated with the warrant requirement." (Brief 45). As we are all aware, there are and have been other cases pending before this Court in which the effect of "inadvertent failure" is in issue. See *United States v. Leon, cert. granted,* No. 82-1771 (June 27, 1983). But here there was nothing inadvertent: the government deliberately lied to the judge.

The government also invokes the car search exception to the warrant requirement. To the great detriment of respondent Rhodes, the Court of Appeals gave the car search exception its greatest scope: every time the beeper entered a car, the respondents lost not only the protection of the warrant clause but the entire protection of the fourth amendment for whatever monitoring occurred while the beeper was in the car. 710 F.2d at 1441. The only reason to raise car searches here is to attempt to expand the car search exception into the home.

The requirement of a warrant "subject only to a few specifically established and well-delineated exceptions" is fundamental.[8] See, *e.g., United States v. Ross,* 456 U.S. 798, 825 (1982); *New York v. Belton,* 453 U.S. 454, 457 (1981); *Mincey v. Arizona,* 437 U.S. 385, 390 (1978); *Marsha'l v. Barlow's, Inc.,* 436 U.S. 307 (1978); *United States v. Chadwick,* 433 U.S. 1 (1977); *G.M. Leasing Corp. v. United States,* 429 U.S. 338 (1977). Whatever exceptions may have been made to the warrant requirement, it clearly

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[8]*Katz v. United States,* 389 U.S. 347, 357 (1967).

retains its full validity in homes and offices (and, necessarily, in such home/office type areas as private storage lockers). See, *e.g.*, the government's argument in *United States v. Chadwick*, 433 U.S. 1, 6-7 (1977) that the warrant requirement for searches in homes, offices, and private communications lies "at the core of the Fourth Amendment." In *Chadwick* the Court was emphatic in holding that the government's view that the fourth amendment's warrant requirement was limited to these places was far too narrow. See *id.* at 6-11, 16-17 (Brennan, J., concurring), 17 (Blackmun, J., dissenting). Although the dissenting opinion in *Chadwick* noted that this unduly narrow argument "served to distract the Court from the more important task," *id.*, here the government is taking an even narrower view by contending that some non-exigent invasions of the home are not protected by the fourth amendment generally or the warrant clause particularly.

The government returns again and again to an argument that some balance should be struck that will allow it to intrude beepers into homes without a warrant and without probable cause. But:

> "The warrant requirement has been a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency."

Arkansas v. Sanders, 442 U.S. 753, 758 (1979) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971)).

This very case provides an example of the indiscriminate effect these devices can have on those who are not involved in or who are not the targets of the surveillance.

Here, for example, the beeper went into the home of the father of one of the respondents. (J. App. 54, 76-77). It takes little imagination to envision the inherent potential in these devices for unrestrained intrusion in the lives of innocent people. The government, in arguing for a balance that would allow it to use these devices at will, free of judicial restraint, seeks to load the balance by stressing only their utility in catching drug manufacturers and dealers. Whether this narrow focus is an intentional appeal to the emotional issue of drug trafficking, it certainly understates the capabilities, potential uses, and potential misuses of the devices. The government, like the ancient Greeks, is using the drug trade as a Trojan Horse to conceal its soldiers inside the home.

IV. Adopting A Standard Of Reasonable Suspicion Of Criminal Activity In This Situation Would Be A Violation Of The Fourth Amendment.

The government asks this Court to adopt a standard of "reasonable suspicion that criminal activity is afoot" in all cases utilizing beepers, regardless of the intrusion involved. (Brief 37). It argues that even if monitoring the beeper under the facts of this case constituted a search or seizure under the fourth amendment, the beeper use should be considered "reasonable" if based upon reasonable suspicion as opposed to probable cause. The government cites *Terry v. Ohio*, 392 U.S. 1 (1968) and this Courts' recognition that not all police actions that qualify as fourth amendment searches or seizures are so intrusive that they require probable cause. The government cites no authority in support of its position that search or seizure into *private storage lockers* and *private residences* over an *unlimited period of time* is "reasonable" under the fourth

amendment when supported by a mere reasonable suspicion of criminal activity.

The instant case is not subject to the application of *Terry* principles. *Terry* involved the narrow authority of police officers to undertake investigative action on a public street, a limited physical intrusion for a brief period of time. The Court found even this limited "frisk" in *Terry* to constitute a "search" under the fourth amendment. The sole justification for the "search" in *Terry* was the protection of the officer, a justification not remotely arguable under the facts of the present case.

The recent decisions of this Court do not support application of *Terry* principles to the searches and seizures encountered here. *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976), dealt with routine vehicle stops at fixed checkpoints on the public roadways and detention for a few minutes. *United States v. Villamonte-Marquez,* 103 S. Ct. 2573 (1983), sanctioned the suspicionless boarding of vessels on waterways open to the sea to examine the vessel's documentation. Both involved the exigent circumstances of mobility intertwined with the customs search rationale. Neither of these exigencies are present here.

Michigan v. Long, 103 S. Ct. 3469 (1983), applying *Terry* principles to a weapons search of a vehicle during a lawful stop, reiterated that the allowance of searches and seizures based on reasonable and articulable suspicion is severely limited. The *Terry* "stop and frisk" doctrine comes into play only when police officers are in danger and exigent circumstances preclude resort to the judiciary. Cases decided prior to *Long* showed that only "protection of police and others can justify protective searches when

police have a reasonable belief that the suspect poses a danger." *Id.* at 3480. The search in *Long* was "restricted to those areas to which *Long* would generally have immediate control, and that could contain a weapon". *Id.* at 3481.

None of these cases presented a factual situation analogous to the present case. None addressed governmental intrusions into private areas of traditional constitutional sanctity that individuals enjoy in their homes. None addressed governmental intrusions virtually unlimited in duration. All involved exigencies that prevented access to a magistrate. The government now asks this Court to remove the traditional constitutional protections of privacy afforded the individual in a home and place him in the same position as if he were walking a public street, driving a public roadway or traveling through a public airport. This Court has traditionally rejected such attempted inroads and should do so here.

Perhaps the most remarkable of the government's analogies is to *United States v. Place*, 103 S. Ct. 2637 (1983). Although *Place* extended the *Terry* doctrine to a seizure of luggage, the touchstone of *Place* was a reaffirmaiton of the *Terry* requirement that the detention must be brief.

> The length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause. Although we have recognized the reasonableness of seizures longer than the momentary ones involved in *Terry, Adams* [*v. Williams*, 407 U. S. 143 (1972)], and [*United States v.*] *Brignoni-Ponce* [422 U.S. 873 (1975)], see *Michigan v. Summers*, [452 U.S. 692 (1981)], the brevity of the invasion of the individual's

> Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion.

United States v. Place, 103 S. Ct. at 2645.

The government also equates the five-month-long monitoring of the beeper from within storage lockers and homes in this case with the minimal intrusion involved in the "canine sniff" of a traveler's luggage in a public airport. (Brief 30). The *Place* decision did not question that detention of personal luggage upon reasonble suspicion of drug-trafficking was an intrusion on an individual's personal security but held that exposure of the luggage, located in a public place, to a trained narcotics detection dog did not constitute a "search" within the meaning of the fourth amendment. Therefore, no warrant was required for the canine sniff of the luggage in the first instance.

In making its determination in *Place*, the Court noted that the canine sniff of the luggage in a public place did not require opening the luggage nor did it expose ***noncontraband*** items "that otherwise would remain hidden from public view." 103 S. Ct. at 2644. The sniff disclosed only the presence or absence of the odor of narcotics, a contraband item, outside of the luggage.

The principles of the canine sniff have no application to this case. The canine sniff involves the suspected presence of only contraband items whereas the present case involves tracking a noncontraband substance removed from public view. The canine sniff generally pertains to luggage or packages located in a public place whereas the intrusions in the present case were directed into private storage lockers and homes. The canine sniff is extremely

limited in duration whereas the present case allowed intrusions into private areas for extended periods of time. The canine sniff involves a reaction to the odor of contraband present on the outside of the item, permitting the deduction that contraband is present inside the item, whereas in the present case the governmental presence, through its beepers, extended directly into areas traditionally associated with legitimate privacy expectations. The canine sniff generally involves the exigencies incident to the movement of travelers and their luggage through public areas such as airports, whereas the present case demonstrates no such exigencies. Moreover, the dogs themselves in these cases were never placed inside homes, private luggage and other protected places in order to obtain information unavailable without such an inside "detector."

In *United States v. Michael*, 645 F.2d 252 (5th Cir.) (en banc), *cert. denied* (apparently because of prematurity), 454 U.S. 950 (1981), Judge Tate's dissent prophesied the government's argument here.

> The standard that reasonable suspicion of criminal activity is a justification for a warrantless search is newly created in this case. No case is cited to support it. In oral argument government counsel were asked to supply cases supporting this theory. Counsel could come up with nothing. Sitting en banc we have the power to create this new rule subject to Supreme Court review. But there should be some better basis than the mischaracterization of the intrusion as a nickel and dime trespass, and the fact that the police were trying to catch illegal drug manufacturers. As surely as the sun rises, reasonable suspicion will now be urged as justification for intrusions that even the majority would accept as serious, and searches heretofore barred by the Fourth Amendment will be urged

> as valid because done in pursuit of all types of suspected criminal activity. In fact, few searches are made for any reason other than attempts to catch suspected law violators.

645 F.2d at 272-73 (footnote omitted).[9]

What Judge Tate feared has happened. The government now asks this Court to apply the standard of reasonable suspicion to this case where there have been several serious intrusions into the respondents' homes, into private storage units leased for the purpose of securely storing personal belongings and into their activities for a five month period. If the government is permitted to excise the entire second clause requiring probable cause and a warrant prior to a search, precious little will remain of the fourth amendment.

V. It Is Feasible To Secure A Warrant Prior To Installing And Monitoring A Beeper.

The government argues that the use of beepers should be considered a special—new—exigent circumstance because it is not feasible to secure a warrant prior to installing or monitoring them (Brief 38). The facts in this case belie that contention. Here, the government did seek and secure a warrant. 710 F.2d at 1435. That warrant authorized the installation of a beeper into a five gallon can of ether for thirty days. The government is now before this Court arguing that a warrant is unnecessary and impractical, not because it could not secure one in this case but rather because it presented the judge with an affidavit

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[9] In *Michael* there was no physical intrusion into a home or even into a container—the agents attached the beeper to the outside of an automobile.

that was "phony as a three dollar bill" (J. App. 156). Assuming the government had been capable of making a showing of probable cause without resort to lies, it could have secured a warrant prior to installing its beeper. There was ample time not only to obtain the warrant but for the officers to fully consult with the prosecuting attorney regarding each element of the use of the beeper.

In several other Court of Appeals cases involving beepers, the government secured warrants or warrant equivalents prior to installing its beepers. See, *e.g., United States v. Cassity*, 720 F.2d 451 (6th Cir. 1983), *petition for cert. pending*, No. 83-1393; *United States v. Butts*, 710 F. 2d 1139 (5th Cir.), *rehearing en banc granted*, No. 82-1260 (Oct. 25, 1983); *United States v. Chavez*, 603 F.2d 143 (10th Cir. 1979).

In fact, because government agents must have sufficient time to clandestinely seize the object into which they will secrete their beeper, as well as time to return this object without the suspects knowledge, there will always be enough time to secure a warrant.[10]

The government also argues that a warrant is not feasible for a beeper because it cannot fashion one that will comply with the particularity clause of the fourth amendment (Brief 12, 42). The most readily apparent defect in this argument is that it suggests throwing out the baby with the bath water. Assuming it were impossible to comply with the particularity clause (it is not), this would hardly be justification for abandoning the applica-

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[10]Rule 41 of the Federal Rules of Criminal Procedure contains a provision for a telephone warrant making it even easier and taking almost no time.

tion of the fourth amendment altogether. Although there are numerous lower court decisions dealing with the relationship between beepers and the fourth amendment, the government has not cited a single decision that has concerned itself with the purported difficulty in complying with the particularity clause.

The government is aware that the decisions concerning electronic eavesdropping on conversations provide some analogy (see brief 41 n.15),[11] but fails to examine that analogy in this context. *United States v. Donovan*, 429 U.S. 413, 427-28, 436-37 (1977), applied the particularization requirements of *Katz v. United States*, 389 U.S. 347, 354-56 (1967) and *Berger v. New York*, 388 U.S. 41, 58-60 (1967 to conversations intercepted without having been particularized in the warrant. The Court concluded that the inability to particularize did not invalidate the interception. There is no intimation that the warrant requirement of *Berger* and *Katz* should be disregarded altogether because of an inability to particularize. In *United States v. Kahn*, 415 U.S. 143, 155 n.15 (1974), the Court held that the constitutional and resultant statutory requirements[12] were "satisfied by identification of the tele-

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[11]This analogy is actually more helpful to the defendants than to the government. The government argues that a warrant should not be required because the warrant could not fulfill its notice function if the surveillance were to be carried out surreptitiously. Footnote 15 of the government's brief recognizes that the notice function is equally absent in warrants for electronic eavesdropping on conversations. Nevertheless, a warrant is required for that type of electronic eavesdropping.

[12]18 U.S.C. § 2518(1) (b) (1976). *See Donovan*, 429 U.S. at 427.

phone line to be tapped and the particular conversations to be seized." *Donovan*, 429 U.S. at 426 n.15. There is obviously no particularization problem associated with the installation of the beeper. Regarding the monitoring, it may be said that the locations of the beeper's container are the fourth amendment's "things to be seized." The "seizure" is the ascertainment of these locations.

Another possible solution is to analogize the situation to the procedure prescribed in 18 U.S.C. § 2517(5) (1976). That subsection allows interception and use of wiretap information relating to offenses other than those specified in the wiretap order, subject to judicial approval. The constitutionality of this subsection was considered in *United States v. Cox*, 449 F.2d 679, 684-87 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972). There the court first relied somewhat hesitantly on an analogy to the plain view doctrine. *Id.* at 686. More recent decisions, such as *Texas v. Brown*, 103 S. Ct. 1535 (1983), should dispel this hesitancy by making the scope of the doctrine clearer. The *Cox* Court also applied a simple reasonableness analysis:

> It would be the height of unreasonableness to distinguish between information specifically authorized and that which is unanticipated and which develops in the course of an authorized search . . . .
>
> . . .
>
> If wiretapping is to be validated . . . then the interception and use of information which is so related to the original search is not to be excluded.

Id. at 687.

In any event this Court has never read the fourth amendment to require throwing out the baby with the bath water:

> The requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement.

Lopez v. United States, 373 U.S. 427, 464 (1963) (Brennan, J., dissenting) quoted with approval in *Berger v. New York*, 388 U.S. 41, 63 (1967).

The government also argues that an exigency is created because their agents cannot know at the time they seek the initial warrant authorizing installation where the beeper will travel or for how long. Assuming the agents obtain a proper warrant in the first place, it should be a relatively simple matter to seek modifications or extensions as the investigation progresses.[13]

Finally, the government argues that "[a]s a practical matter" it does not improperly use beepers (Brief 32). In other words: "Trust us". Its case for trust is not convincing when, only four years after being rebuked for taking an "extreme view of the Fourth Amendment," by saying it only applies to the home[14], the government now comes into court and takes the even more extreme position that the fourth amendment does not even apply in the home. The Court previously has spoken to this contention:

> It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before

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[13]Indeed that is precisely what happened here. The record is replete with supplemental applications for beeper orders, requests for entry tone alarms and finally, an application for a search warrant (J. App. 35-41).

[14]*United States v. Chadwick*, 433 U.S. 1, 16 (1977) (Brennan, J., concurring); see p. 17 *supra*.

> commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate.

Katz v. United States, 389 U.S. 347, 356 (1967).

The fourth amendment was adopted by people who did not invariably trust their own government to restrain itself from improper searches. If times or circumstances have changed to the point that we should invest the government with this trust, then the appropriate response is to change the fourth amendment, not to rely on assurances that government agents are normally to be so trusted.

This argument is especially difficult to swallow here where the very government agents we are being asked to trust made false statements under oath (J. App. 156).

VI. The Fourth Amendment Must Flex To Meet The Challenge Of New Technology.

Beepers present the courts with the problem of applying established legal concepts to revolutionary technology. But there is a critical difference between the beeper situation and the other technological issues that have recently confronted this Court. A fitting contrast is provided by *Sony Corp. v. Universal City Studios*, 104 S. Ct. 774 (1984).

> It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written.

Id. at 796.

Here, the law, the fourth amendment, has already been written. Its application to the new technology is for the

judicial branch, not for the legislative branch. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). This Court should set the limits now.

As Justice Rehnquist said in *Knotts* in response to the respondent's concerns that beepers would become instruments of 24 hour surveillance, "if such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." 103 S. Ct. at 1086 (1983). That time has come. In *Knotts* the government tracked three defendants, two automobiles and one can of chloroform for one afternoon. The government, according to the evidence in that case, could have visually followed the subject container without the beeper. In our case, the government, after invading a closed container to install the same kind of beeper, continuously invaded the private activities of six defendants, an undetermined number of uninvolved people, four houses and two storage lockers for five months. Furthermore, here the government tried and failed to keep up with the ether without the beeper.[15]

The government makes much of the truism that police efficiency does not equate with unconstitutionality. (Brief 28 n. 12). That truism, though, is not inconsistent with the more pertinent observation:

> Some may claim that without the use of such devices crime detection in certain areas may suffer some delays since eavesdropping is quicker, easier, and more certain. However, techniques and practices may well

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[15]The government, although attempting to argue to the contrary, accepts this proposition when it says that the beeper was indispensable (Brief 36).

> be developed that will operate just as speedily and certainly and—what is more important—without attending illegality.

Berger v. New York, 388 U.S. 41, 63 (1967).

It is also pertinent that, in a case involving the heroin-related murder of a police officer, the Court has said:

> [T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. *Cf. Coolidge v. New Hampshire*, [403 U.S. 443, 481 (1971)]. The investigation of crime would always be simplified if warrants were unnecessary. But the fourth amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.
>
> . . .
>
> We decline to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the fourth amendment justify a warrantless search.

Mincey v. Arizona, 437 U.S. 385, 393-94 (1978).

VII. Installation Of A Beeper Requires A Warrant.

The Court of Appeals held in this case that "before the government agents could transfer the can of ether containing a beeper to Karo, they had to obtain an authorizing warrant." 710 F.2d at 1433, 1439 (1983). There can be no doubt that the can of ether was an item in which respondents Karo, Horton, and Harley had legitimate expectations of privacy. It was a sealed container no different from a purse or a suitcase. See *United States*

v. Ross, 456 U.S. 798, 822 (1982). The container belonged to these defendants. 710 F.2d at 1437. "There is . . . a strong historical connection between the Warrant Clause and the initial clause of the Fourth Amendment, which draws no distinctions among 'persons, houses, papers, and effects' in safeguarding against unreasonable searches and seizures." *United States v. Chadwick,* 433 U.S. 1, 8 (1977).

The Court of Appeals held that "regardless of the consent obtained when the beeper is physically installed, an infringement of the new owner's Fourth Amendment rights begins at the time the object comes into his control." 710 F.2d at 1438 (footnote omitted). That Court's analogy to a suitcase is appropriate. Otherwise, what is there to stop government agents from installing their beepers into any object they know will go into a potential subject's possession, including books, tape recorders, or letters, that a suspect might carry with him?

The government argues that the informant's consent to installation of the beeper makes the entire search consensual because "a beeper discloses no information about the container's contents that was not already known to the agents when the beeper was installed and it discloses nothing about what a third party might have taken from or placed into the container after it came into his possession." (Brief 21, 22). The Court of Appeals responded appropriately to this simplistic analysis:

> We do not think that the analysis should end at this rudimentary level. Although the physical installation of the beeper in the can takes place before the new owner picks it up, we believe an instrusion occurs at the time the item comes into his possession. All individuals have a legitimate expectation of privacy

> that objects coming into their rightful ownership do not have electronic devices attached to them, devices that would give law enforcement agents the opportunity to monitor the location of the objects at all times and in every place that the objects are taken, including inside private residences and other areas where the right to be free from warrantless governmental intrusion is unquestioned.

710 F.2d at 1438.

We would not dispute the informant's right to notify the government of the whereabouts of the ether, nor would we dispute his right to follow the container around on public streets. *See, e.g., United States v. Knotts,* 103 S. Ct. at 1085. Similarly, we would not dispute his right to strap a tape recorder under his coat and record any conversation he may have with the respondents. *See, e.g., United States v. White,* 401 U.S. 745 (1971). But we strenuously dispute his right to place an electronic eavesdropping device inside their property or inside their homes. The fourth amendment prohibits such activity. *Katz v. United States,* 389 U.S. 347 (1967). Just as an informant could not have tapped the telephone booth that Mr. Katz used and then reported to the government on Katz' conversations, so an informant cannot consent to install a beeper on these respondents' property nor inside their homes so that police officers can search these areas.

The government misapprehends this argument when it states that "the decision in *Knotts* would be a dead letter except in those cases in which the defendant's lawyer fails to object to installation of the beeper." (Brief 23). This very case refutes the government's assertion: the objections of the lawyers for defendants who did not own the ether (Roth, Rhodes, and Steele) were to no avail. *See,*

e.g., Rawlings v. Kentucky, 448 U.S. 98 (1980). *Knotts* still allows warrantless monitoring of beepers on the highway, at least when there has been no invasion of the privacy interest of the driver. It follows traditional fourth amendment analysis in holding that the automobile exception and the open fields exception do not require warrants. This is consistent with the analysis of fourth amendment interests in *Wong Sun v. United States,* 371 U.S. 471 (1963). Defendants who have a privacy interest in the place of the primary illegality—the can of ether—can challenge the use of its fruits. Likewise, defendants who have an interest in the place of seizure—the Taos house—can challenge the fruits of that seizure. See 371 U.S. at 477-88.

The government also misconstrues the Court of Appeals' decision when it asserts that Respondent Karo's fourth amendment claim arises solely from the installation of a beeper without a warrant. (Brief 8, 10, 22, 23). This was *dictum* or, at most, an alternative rationale for a decision in the Court of Appeals as to Karo only. The Court of Appeals noted that Karo suffered the same in-into his home as did the other four respondents. See 710 F.2d at 1437, 1440.[16] The government ignores these facts when it states "here, respondent Karo certainly had no greater privacy interest in the location of the container than did the defendant in *Knotts.*" (Brief 22). The container with the beeper never went inside Knotts' residence. 103 S. Ct. at 1987. In our case "the signal [was] received

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[16]The Court of Appeals correctly held that the search and seizure at the Taos house was the fruit of prior illegality, including both the installation and the monitoring of the beeper in private residences.

from the Karo residence, 1108 Monroe." (Testimony of DEA Agent Richard Rottinger, J. App. 120).

Furthermore, there is absolutely no evidence in this case that "as was the case in *Knotts*, the same information could have been obtained by direct visual surveillance." (Brief 22). In fact, the evidence is to the contrary. According to the affidavit for search warrant the officers used visual surveillance to follow Karo to his home with the ether. Although visual surveillance continued, it ceased to be effective at that point.

> After about an hour, we observed the vehicle (in which the cans were located 19-20 September 1980 in the public street) as it returned to the vicinity of Graphic Photo Design, and we no longer saw the cans of ether in the vehicle. Additionally, using a "beeper" locator (direction finder) we determined that at least the can with five gallons of ether in the beeper can was located at 1108 Monroe, SE, Albuquerque. [Karo's residence].

(J. App. 54).

Therefore, as to Karo, Horton and Harley, there were two fourth amendment violations: First, when the sealed ether can containing personal property belonging to the three of them came into their possession they were entitled to receive it in a private condition without the beeper. Second, they, along with the other respondents, were entitled to freedom from warranteless invasions into their homes and private storage lockers.

VIII. The Decision Should Be Affirmed Because Of The Government's Outrageous Conduct.

Although the courts below have not yet ruled on it, respondents have consistently insisted that the evidence

should be suppressed because of the misconduct of the government in coming into a Federal District Judge's chambers and lying to obtain a search warrant. This contention has been based on the due process concept of outrageous government conduct and on the inherent supervisory powers of the courts. It is appropriate for consideration here "because the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n. 8 (1977).

The supervisory power of the federal courts permits them "to supervise 'the administration of criminal justice' among the parties before the bar." *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980) (citation omitted). This power includes the exclusion of evidence taken from a defendant by the "willful disobedience of law." *McNabb v. United States*, 318 U.S. 332, 345 (1943).

Here the district judge found:

> As far as the affidavit, I will say possibly there are not too many outright blatant falsehoods, but as a result of half-truths, innuendos, deliberate attempt to create an impression other than the actual fact, my view is that the original affidavit, as putting it bluntly, is as phony as a three dollar bill. And then you have not only that, that it was deliberately conceived to give a false impression, and I might add, a good job was done in that regard. Reading of that affidavit, you come out with a far different impression of the facts than the actual truth.

(J. App. 156.)

In *United States v. Cortina*, 630 F.2d 1207 (7th Cir. 1980), as here, the government lied in its application for

a search warrant, although the United States Attorney's Office did not directly participate in the lie. The holding there will be quoted at length because it well states the argument:

> *Our holding is therefore simple—we will not allow or condone reckless or deliberate misrepresentations made to magistrates.* But we note that our holding is not based merely on abhorrence of Agent Brown's conduct, for that would not justify use of our power to suppress the evidence. *United States v. Payner,* . . . 100 S.Ct. at 2444. We recognize that the federal supervisory power does not give "the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it [does] not approve." *United States v. Russell,* 411 U.S. 423, 435 . . . (1973). *But we do not merely disagree with the method of law enforcement attempted here; rather, we are preventing the court from condoning a fraud perpetrated upon it.* To allow this evidence to be used at trial would make the federal courts "accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Elkins v. United States,* 364 U.S. at 223 . . . .
>
> There should be no compromise with the principle that agents of the United States cannot be permitted to manipulate the judicial system to circumvent constitutional requirements. . . .
>
> The recent decision of *United States v. Payner,* . . . 100 S. Ct. 2439 . . . (1980), does not mandate a different result. In fact, upon analysis, the *Payner* decision supports the conclusion we have reached.
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> . . .
>
> The Supreme Court emphasized that its decision in *Payner* "does not limit the traditional scope of the supervisory power in any way." . . . 100 S. Ct. at 2446. The cornerstone of *Payner* was that the evidence was seized from "a third party not before the court." . . . 100 S. Ct. at 2446 n. 8. . . .
>
> . . .

By invoking the doctrine of legitimate expectation of privacy under our circumstances, the government would interpret *Payner* to hold that the scope of the supervisory power is identical to that of the Fourth Amendment. But had it so held, *Payner* would have rendered the supervisory power superfluous in cases involving searches and seizures, a result the Supreme Court expressly rejected. . . . *Application of the supervisory power is limited to situations where there has been a fraud upon the court in addition to a violation of the defendant's rights.* . . .

The need for deterrence of illegal conduct is, in one sense, greater here than it was in *Payner*, for [FBI Agent] Brown's offense was committed within the sancity of the court itself. *The violation here is particularly insidious because it is difficult to uncover misrepresentations in an affidavit underlying a search warrant.* The information needed to prove such assertions false is peculiarly within the hands of the government. . . .

The call to protect our judicial integrity, the second interest to be weighed, is particularly strong here because Brown's misconduct compromised judicial procedures mandated by the Constitution. . . . Unless officers of the law know that the consequences of deliberate misrepresentations will be the suppression of the evidence, "lawless or reckless misconduct" will not only be encouraged, but invited. . . . *Courts must act in their own self-defense against brazen violations of their procedures.* We must draw the line at misconduct occurring within our own house.[17].

Weighed against these two interests is the detrimental effect of excluding the evidence. The Court in *Payner* expressed concern that "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably

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[17] *Cf. United States v. Janis*, 428 U.S. 433, 458-59 n.35 (1976) ("courts must not . . . encourage violations of the constitution.")

> the truth-finding functions of judge and jury." . . . 100 S.Ct. at 2445-46. Here, however, it is that truth-finding function itself which has been corrupted, not because of suppression, but because of the lies told to the magistrate. The truth-finding functions of that magistrate are vindicated, not impeded, by suppression, here.
>
> Our standard is plain: when the government lies to the magistrate in securing a warrant to the extent that there is no probable cause for the search, and when that search results in the seizure of evidence, this Court will suppress the evidence.

630 F.2d at 1214-17 (footnotes omitted, emphasis added).

It has long been the rule that the prosecution's knowing use, at trial, of perjured testimony will require reversal of the conviction. See *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). This is so even when the government merely allows an unsolicited falsehood to go uncorrected. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). These rules are based on the due process clause. If for any reason this Court felt the supervisory power would be inapplicable in this case, then due process should require affirmance. It is difficult to distinguish between the situation where the prosecution lies to the judge and the situation where the prosecutor allows a witness to lie to the jury. If a difference exists, it is more reprehensible here where the prosecutor directly participated in the lie. Chief Justice Hughes referred to "the duty of the court to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers and to preserve the purity of its courts." *Sorrells v. United States*, 287 U.S. 435, 446 (1932).

The fraud in this case included wording the affidavits so it would appear to the Court that the focus of the search

was an amphetamine laboratory. (J. App. 43-44). In fact, the agents knew from the very beginning of their investigation that they would be attempting to find a laboratory where cocaine would be extracted from clothing. (J. App. 103). This is similar to the factual setting in *United States v. Rettig,* 589 F.2d 418, 422 (9th Cir. 1978) where failure to accurately describe these circumstances to the judicial officers, in essence, created a general search because the court could not determine its proper scope.

The judge is more important to the functioning of the courts than is the grand jury. Yet a conviction was set aside in *United States v. Hogan,* 712 F.2d 757 (2d Cir. 1983) because the Assistant United States Attorney participated in misleading the grand jury. "Taking advantage of his special position of trust, the AUSA impaired the grand jury's integrity as an independent body." *Id.* at 762. *United States v. Hasting,* 103 S. Ct. 1974 (1983), with its emphasis on harmless error, did not prevent the exercise of supervisory power because without the misleading presentation "appellants might not have been indicted." 712 F.2d at 762 n.2.

Hasting leaves the doctrine fully available here. Judicial integrity is much more at stake when a federal agent, with the help and guidance of an Assistant United States Attorney, lies under oath to a judge. Suppression, a remedy more narrowly tailored than dismissal, is an appropriate deterrent. Each defendant has a personal due process right not to have his prosecution initiated by deliberate governmental fraud upon the judiciary. *Cf.* 103 S. Ct. at 1978.

Thus, even if this Court agrees with the government that one or all of these defendants have not exhibited a legitimate expectation of privacy, two unmistakable facts remain: an egregious fraud has been perpetrated on the federal judiciary and these defendants' rights have been violated by that fraud. This Court, in the interest of preserving the integrity of the judiciary, should affirm the suppression of this evidence.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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